

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division

BID FOR POSITION, LLC,

Plaintiff/Counterclaim Defendant,

v.

Civil Action No. 2:07cv582 (JBF-TEM)

AOL LLC,  
GOOGLE INC.,  
MICROSOFT CORP.,  
and MIVA, INC.,

Defendants/Counterclaim Plaintiffs.

**MOTION AND MEMORANDUM IN SUPPORT OF MOTION  
TO FILE UNDER SEAL CERTAIN EXHIBITS TO AND CERTAIN PORTIONS OF  
DEFENDANTS' JOINT OPENING BRIEF ON CLAIM CONSTRUCTION**

Pursuant to Local Civ. R. 5 and the Agreed Protective Order (“Protective Order”) entered by the Court on April 28, 2008, Defendants, AOL LLC, Google Inc., Microsoft Corp. and MIVA, Inc. (collectively, “Defendants”), by counsel, move for leave to file under seal certain exhibits (“Confidential Exhibits”) to Defendants’ Joint Opening Brief on Claim Construction (“Joint Brief”) as well as certain portions of the Joint Brief. In support of this Motion, Defendants state as follows:

1. Paragraph 23 of the Protective Order entered in this case states:
  - a. In the event a party wishes to use Protected Information, or any papers containing or making reference to the contents of such Protected Information, in any pleading or document filed with the Court in this litigation, such pleading or document and Protected Information shall be filed under seal, until such time as the Court orders or otherwise denies permission to file under seal, and such Protected Information, or papers, shall plainly state on the first page of any bound or stapled document “Confidential—Filed Under Seal” and shall be filed only in

sealed envelopes on which shall be endorsed the caption of this action and a statement substantially in the following form:

CONFIDENTIAL

This envelope contains documents that are subject to a Stipulation and Protective Order Governing Discovery Material entered by the Court in this action. This envelope shall neither be opened nor the contents revealed except by Order of the Court.

- b. Whenever a party files a document under seal with the Court, that party shall simultaneously file a motion requesting that the Court enter an order permitting the document to remain under seal. When such a motion is filed, the following steps must be taken:
  - i. The Clerk shall provide public notice by docketing the motion in a way that discloses its nature as a motion to seal, with a hearing date (if any);
  - ii. The Clerk shall provide interested persons an opportunity to submit memoranda in support of or in opposition to the motion;
  - iii. The document and any confidential memoranda shall be treated as sealed pending a ruling on the motion;
  - iv. If the Court decides to seal the documents at issue, it must state its reasons on the record, supported by specific findings; and
  - v. The Court must state its reasons for rejecting alternatives to closure.

The parties agree to follow in an expeditious manner any additional procedures imposed by the Court, including Local Rule 5 of the Local Rules of Practice for the United States District Court for the Eastern District of Virginia as a prerequisite to filing any document under seal. If the Court declines to allow the material to remain under seal, the materials shall not be unsealed until at least 10 days notice has been to the producing party to allow for the retrieval of any designated information prior to any papers being unsealed.

2. The proposed Confidential Exhibits include Exhibits (Exhibit 3) to the Declaration of Defendants in Support of the Joint Brief and portions of the Joint Brief that cite to that Exhibit.

3. As the Confidential Exhibits (Exhibit 3) and portions of the Joint Brief contain and/or refer to information that has been designated by one or more of the parties as “Confidential” and/or “Highly Confidential” under the Confidentiality Order, Defendants seek permission to file those exhibits under seal.

4. The Confidential Exhibits (Exhibit 3) and portions of the Joint Brief contain testimony from the inventor of one of the patents in suit that are designated as “Confidential” and/or “Highly Confidential” by operation of Paragraph 26 of the Protective Order. Failing to file the Confidential Exhibits and portions of the Joint Brief under seal may risk the disclosure of the parties’ confidential, trade secret information, would violate the Protective Order and potentially would cause competitive harm.

5. Defendants have sent copies of the Confidential Exhibits (Exhibit 3) and the Joint Brief to opposing counsel. In-camera copies of the same will be sent to the Court as well. Plaintiff has agreed to review the Confidential Exhibits and portions of the Joint Brief, and, if possible, withdraw the confidential designations.

6. Before this Court may seal Court documents, it must: “(1) provide public notice of the request to seal an allowance to the parties a reasonable opportunity to object; (2) consider less drastic alternatives to sealing the documents; and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives.” *Ashcraft v. Connoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000). (Internal citations omitted.)

7. In compliance with Local Rule 5 of the Rules of this Court and *Ashcraft*, Defendants have attached a Public Notice of Defendants’ Motion to Seal along with a proposed Order.

8. Defendants request that the Court retain sealed materials until forty-five (45) days after a final order is entered and request that unless the case is appealed that any sealed materials be returned to counsel for the filing parties.

WHEREFORE, based on the foregoing, Defendants respectfully request this Motion be GRANTED and that Defendants' Confidential Exhibits (Exhibit 3), portions of the Joint Brief and any other confidential exhibits filed in support of the Joint Brief be filed under seal as set forth in the the Proposed Order attached as **Exhibit 1**.

Dated: May 12, 2008

Respectfully submitted,

/s/

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### **CERTIFICATE OF SERVICE**

I hereby certify that on May 12, 2008, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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